

1 Douglas J. Rovens (State Bar # 106582)
2 *drovens@ssd.com*
3 Jeffrey S. Renzi (State Bar # 221963)
jrenzi@ssd.com
3 SQUIRE, SANDERS & DEMPSEY L.L.P.
4 555 S. Flower St., 31st Floor
4 Los Angeles, CA 90071
5 Telephone: (213) 624-2500
5 Facsimile: (213) 623-4581

6 Attorneys for Defendant
7 4ACCESS COMMUNICATIONS COMPANY

8
9 UNITED STATES DISTRICT COURT
10
11 SOUTHERN DISTRICT OF CALIFORNIA

12 VAL POPESCU, an individual;
13 Plaintiff,
14 vs.
15 4ACCESS COMMUNICATIONS
16 COMPANY, a Delaware corporation, and
17 DOES 1 through 10, inclusive,
18 Defendants.

19 Case No. 3:08 CV 00525 JM RBB

20 DEFENDANT 4ACCESS
21 COMMUNICATIONS COMPANY'S
22 REPLY IN SUPPORT OF MOTION TO
23 DISMISS FOR IMPROPER VENUE

24 *[Evidentiary Objections to the Declaration of
25 Val Popescu Filed Concurrently Herewith]*

26 The Honorable Jeffrey T. Miller

27 Hearing: Date: May 30, 2008
28 Time: 1:30 p.m.
Place: Courtroom 16

[Oral Argument Requested]

1 **REPLY IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE**

2 **I. INTRODUCTION**

3 The claims asserted by plaintiff Val Popescu (“Plaintiff”) arise from his employment
 4 relationship with defendant 4Access Communications Company (“4Access”). The February 27,
 5 2002 Employment Agreement (“Employment Agreement”) governed Plaintiff’s employment at
 6 4Access, yet Plaintiff asks the Court to ignore that agreement and this Court’s prior ruling
 7 regarding the applicability of the Employment Agreement to the entire employment relationship
 8 between the parties.¹ Plaintiff’s argument is a thinly veiled attempt to avoid the mandatory forum
 9 selection clause contained in the Employment Agreement. Regardless of how Plaintiff attempts
 10 to frame his allegations, or interprets the facts and case law, the unavoidable conclusion is that:
 11 (1) the Employment Agreement controls the relationship of the parties, (2) the Court will need to
 12 evaluate and interpret that agreement to adjudicate Plaintiff’s claims, and (3) the forum selection
 13 clause applies to Plaintiff’s claims during the at-will employment period and mandates dismissal
 14 of the instant action for improper venue.²

15 **II. ARGUMENT**

16 **A. The Employment Agreement Controls The Relationship Of The Parties**

17 As in *Popescu I*, “[a]t the heart of this case is the employment relationship between the
 18 parties, a relationship that flows from the [Employment Agreement].” *Popescu v. 4Access*
 19 *Communications, Inc.*, 2007 U.S. Dist. LEXIS 21822 (S.D. Cal. March 26, 2007) at *5. Plaintiff
 20 asserts claims in the first amended complaint (“FAC”) for breach of contract for unpaid wages
 21 and stock options, labor supplied, wage and hour violations for lack of payment, and wrongful

22 ¹ Indeed, Plaintiff claims the entire relationship is governed by an “Employment Letter,”
 23 yet Plaintiff fails to even provide a copy of the letter with its papers in opposition to the instant
 motion. (*See Evidentiary Objections to the Declaration of Val Popescu*).

24 ² *Plaintiff, not 4Access*, has the burden to establish venue with respect to each cause of
 25 action using a claim-specific analysis. “Where there are . . . multiple claims in an action, the
 26 plaintiff must establish that venue is proper as to . . . each claim.” *Multimin USA, Inc. v. Walco*
Int’l, Inc., 2006 U.S. Dist. LEXIS 33624 (E.D. Cal. Apr. 7, 2006); *see also, Rothstein v. Carrier*,
 41 F.Supp.2d 381, 386 (E.D.N.Y. 1999), *reversed and remanded on other grounds by Rothstein*
v. Carrier, 373 F.3d 275 (2d Cir. N.Y. 2004) (“Where venue is challenged, it is the plaintiff’s
 burden to show that it is proper in the forum district . . . In a case of multiple claims, proper
 venue must be established with respect to each cause of action asserted.” (citation omitted)).

1 discharge. Regardless of the merits of Plaintiff's allegations, all of Plaintiff's claims have one
 2 common thread—they arise from and are directly related to his employment at 4Access.

3 In Plaintiff's Opposition, he erroneously asserts that a letter signed by the parties on
 4 February 24, 2002 (the so-called "Employment Letter") controlled the employment relationship
 5 of the parties. A review of the Employment Letter reveals that it contemplated Plaintiff's future
 6 employment and only served to memorialize the parties' intent to enter into an employment
 7 relationship. The letter dictated that the parties finalize a subsequent agreement, which they did
 8 on February 27, 2002, with the Employment Agreement. At the time, and not prior to the
 9 execution of that agreement, Plaintiff became an employee of 4Access. The Employment
 10 Agreement evidences this fact as it states, "Company desires to employ Employee, and Employee
 11 desires to be employed by Company as Chief Technology Officer." (Declaration of Steven D.
 12 Davis (submitted with the Motion to Dismiss) ("Davis Decl.") at 3). The employment
 13 relationship commenced with the Employment Agreement, not the letter.³

14 The terms of the Employment Agreement evidence the parties' intent for it to control
 15 Plaintiff's contractual employment and subsequent at-will employment periods at 4Access.
 16 (Davis Decl. at 3). Plaintiff's FAC even invokes terms of the Employment Agreement as the
 17 foundation of his employment and compensation during the at-will employment period, and the
 18 specified salary of \$175,000 per year—at the core of Plaintiff's claims—is specified in the
 19 Employment Agreement. (FAC, ¶ 34).

20 This Court's decision in *Popescu I* made clear that any claim by Plaintiff arising from his
 21 at-will employment with 4Access is subject to the forum selection clause, because the entire
 22 employment relationship flows from the Employment Agreement. *See Popescu*, 2207 U.S. Dist.
 23 LEXIS 21822 at *5, n.1. Plaintiff's contention that *Popescu I* has no bearing on this case because

24 ³ Assuming *arguendo* that Plaintiff's employment at 4Access commenced on February 22,
 25 2002 upon the execution of the Employment Letter, the letter agreement was effectively modified
 26 when the parties executed the Employment Agreement. Pursuant to California Civil Code Section
 27 1698(a), "[a] contract in writing may be modified by a contract in writing." *See Eluschuk v.*
Chemical Engineers Termite Control, Cal. App. 2d 463, 469 (Cal.App. 1966) (finding an original
 28 employment agreement modified by the terms of a subsequent agreement). By assenting to the
 Employment Agreement, Plaintiff modified the terms of any employment relationship previously
 in place with 4Access. As such, Plaintiff accepted the amended employment terms in the
 Employment Agreement, including the forum selection clause.

1 this Court never addressed Plaintiff's labor code claim, wrongful discharge claim, or stock
 2 options claim, and never was advised of the Employment Letter, is immaterial. Plaintiff's claims
 3 arising from his at-will employment flow from and are directly related to the Employment
 4 Agreement, and are thus governed by its terms, including the forum selection clause that applies
 5 to "[a]ny judicial proceedings between the parties under [the Employment Agreement.]" (Davis
 6 Decl. at 7). Plaintiff thereby agreed that claims arising from the at-will employment period must
 7 be pursued in Illinois, and the Court should grant 4Access' motion.

8

9 **B. The Forum Selection Clause Is Enforceable With Regard To Each of**
Plaintiff's Claims

10 Based on this Court's ruling in *Popescu I* and the terms of the Employment Agreement,
 11 the forum selection clause is applicable to claims arising from the employment relationship,
 12 providing a basis for dismissing Plaintiff's FAC. Plaintiff asks the Court to ignore this notion,
 13 arguing the Court must evaluate the applicability of the forum selection clause to each claim.
 14 Should the Court do so, the result is the same—this forum selection clause applies to all of
 15 Plaintiff's claims.

16 In the Ninth Circuit, forum selections clauses are enforced against plaintiffs who are
 17 asserting contract and non-contract claims against parties with whom they have previously signed
 18 contracts. *See Manetti-Farrow v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). In *Manetti-*
Farrow, the plaintiffs alleged tort claims as well as contract claims, yet argued that the tort claims
 19 should not be subject to the contract's forum selection clause. *Id.* at 513-14. The court disagreed
 20 and dismissed plaintiffs' action, noting that the tort claims "relate in some way to rights and
 21 duties enumerated in the [contract]. The claims cannot be adjudicated without analyzing whether
 22 the parties were in compliance with the contract." *Id.* at 514.

24 In *Bender Shipbuilding & Repair Co., v. The Vessel Drive Ocean V*, 123 F.Supp.2d 1201
 25 (S.D. Cal. 1998), the court applied the principles of *Manetti-Farrow* and looked to the language
 26 of the forum selection clause at issue to determine if it applied to the non-contract claims. The
 27 *Bender Shipbuilding* court stated:

28

1 “In *Manetti-Farrow*, the contract provided that any controversy ‘regarding
 2 interpretation or fulfillment’ of the contract must be litigated in Florence, Italy.
 3 The Ninth Circuit held that the various tort claims...related to the rights and duties
 4 under the contract because the claims could not ‘be adjudicated without analyzing
 5 whether the parties were in compliance with the contract.’ (citation omitted.)
 6 Here, the contract provides that ‘all disputes arising out of or in connection with’
 7 the charter party shall be resolved in Vancouver, B.C. and ‘shall be governed by
 8 and construed in accordance with the laws of the Province of British
 Columbia.’...Each of these [tort] claims relates in some way to the rights and
 duties set forth in the [agreement] and each arises ‘in connection’ with the
 [agreement]. Further the tort causes of action are inextricably entwined with the
 contractual claims in the sense that consideration of the alleged torts necessarily
 requires consideration of the contract.”

9 *Id.* at 1207. As in *Manetti-Farrow*, the court in *Bender Shipbuilding* found that the plaintiffs’
 10 non-contract claims fell within the scope of the pertinent forum selection clause because they
 11 arose in connection with the written contract and thus required interpretation of the contract. *Id.*

12 Contrary to Plaintiff’s assertion, the Employment Agreement is indispensable with respect
 13 to the validity of Plaintiff’s employment claims, as it provides the duties, salary, and term of
 14 Plaintiff’s employment. (Davis Decl. at 3-5). For instance, Plaintiff admits that his salary during
 15 the at-will period is a key issue for Plaintiff’s unpaid wages, labor supplied and wage and hour
 16 claims. (Opp’n at 8:9-12, 9:11-17).⁴ By the terms of the Employment Agreement, however,
 17 Plaintiff was an at-will employee, which meant that his “Base Salary may be increased or
 18 decreased in the discretion of the Company at any time.” (Davis Decl. at 4). Further, the
 19 Employment Agreement specified Plaintiff’s duties at 4Access and Plaintiff’s performance (or
 20 lack thereof) of those duties may prove essential to determining any amount still owed by
 21 4Access to Plaintiff. Thus, because the Employment Agreement is essential to determining the
 22 veracity of Plaintiff’s claims, Plaintiff cannot simply ignore its existence.

23 As for Plaintiff’s wrongful termination claim, the necessity of the Employment
 24 Agreement is apparent in Plaintiff’s Opposition to the instant motion. Indeed, Plaintiff
 25 paraphrases portions of the agreement (Opp’n at 13:11-19) for the proposition that Plaintiff was
 26 an at-will employee at the time of his termination. Plaintiff’s at-will status is ultimately

27 ⁴ Further, to the extent that Plaintiff claims his damages for wrongful discharge include
 28 loss of salary (See FAC, ¶52), the Employment Agreement governs Plaintiff’s salary for that
 period.

1 determined pursuant to the terms of the Employment Agreement. (Davis Decl. at 3). Plaintiff
 2 also admits that the reason for Plaintiff's termination is a fundamental issue for this claim.
 3 (Opp'n at 14:3-5). A defense to Plaintiff's claim, however, is that 4Access had a valid reason for
 4 terminating Plaintiff, including for, among other things, Plaintiff's failure to perform pursuant to
 5 the terms of the Employment Agreement.

6 Finally, Plaintiff's claim that 4Access breached an agreement regarding stock options is
 7 likewise subject to the Employment Agreement because such options were issued by 4Access,
 8 while Plaintiff was an employee at 4Access, to provide Plaintiff with an incentive to maximize
 9 the results at the company. Indeed, one of the grant notices was issued in July 2002, during the
 10 "Contractual Employment Period." (Davis Decl. at 3). Thus, although Plaintiff contends he does
 11 not need to invoke the Employment Agreement for this claim, 4Access may defend this claim by
 12 analyzing Plaintiff's compliance with the Employment Agreement, because the grant of the
 13 options was predicated on Plaintiff's employment at 4Access. Plaintiff simply cannot avoid
 14 application of the Employment Agreement.

15

**C. This Court Should Dismiss Plaintiff's Claims In Their Entirety So That
 16 Plaintiff May Pursue Such Claims in the Appropriate Venue**

17 The Court should dismiss Plaintiff's FAC because each cause of action is subject to a
 18 forum selection clause and the only appropriate forum for such claims is in Illinois.⁵ To the
 19 extent the Court concludes that the forum selection clause is not applicable to any one of
 20 Plaintiff's claims, the Court should transfer the entire matter to the United States District Court
 21 for the Northern District of Illinois, Eastern Division. Any decision by the Court to dismiss or

22

⁵ Dismissal, and not transfer, of all of Plaintiff's claims is warranted because it was
 23 obvious after the Court's ruling in *Popescu I* that Plaintiff's claims arising from and directly
 24 related to his at-will employment with 4Access were governed by the Employment Agreement,
 25 and thus subject to the forum selection clause. *See Wood v. Santa Barbara Chamber of
 Commerce, Inc.*, 705 F.2d 1515, 1523 (9th Cir. 1983) (denial of transfer of venue not an abuse of
 26 discretion where improper forum foreseeable); *see also Nichols v. G.D. Searle & Co.*, 991 F.2d
 27 1195, 1201 (4th Cir. 1993) (in the above circumstances decisions to deny transfer "are premised
 28 on the notion that a district court acts within its discretion when it finds that the interest of justice
 is not served by allowing a plaintiff whose attorney committed an obvious error in filing the
 plaintiff's action in the wrong court, and thereby imposed substantial unnecessary costs on both
 the defendant and the judicial system, simply to transfer his/her action to the proper court, with no
 cost to him/herself or his/her attorney").

1 transfer some, but not all of Plaintiff's claims will permit Plaintiff to maintain claims in San
 2 Diego and Illinois, counter to the underlying policy behind 28 U.S.C. § 1406(a). *Continental*
 3 *Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960) ("To permit a situation in which two cases
 4 involving precisely the same issues are simultaneously pending in different District Courts leads
 5 to the wastefulness of time, energy and money that section 1404(a) was designed to prevent.").

6

7 **III. CONCLUSION**

8 Forum selection clauses are presumed valid and enforced where claims require an
 9 interpretation of the contract because they arise from or relate to the contract containing the
 10 clause. *See Manetti-Farrow*, 858 F.2d at 514; *see also Bender Shipbuilding*, 123 F. Supp 2d at
 11 1207. Plaintiff has not made a showing that the enforcement of the forum selection clause would
 12 be improper here. All of Plaintiff's claims arise from and are directly related to the parties'
 13 employment relationship, which in turn is controlled by the Employment Agreement. The forum
 14 selection clause applies to the entirety of Plaintiff's claims and Plaintiff may only pursue his
 15 causes of action in Illinois.

16 Accordingly, 4Access respectfully requests that the Court grant its motion to dismiss as to
 17 all causes of action on the grounds of improper venue.

18

Dated: May 27, 2008

SQUIRE, SANDERS & DEMPSEY L.L.P.

19

By: _____ s/ Jeffrey S. Renzi

Douglas J. Rovens
 Jeffrey S. Renzi

Attorneys for Defendant
 4ACCESS COMMUNICATIONS COMPANY

20

21

22

23

24

25

26

27

28

LOSANGELES/265341.4

PROOF OF SERVICE

(Pursuant to Federal Law)

The undersigned certifies and declares as follows:

I am a resident of the State of California and over 18 years of age and am not a party to this action. My business address is 555 South Flower Street, 31st Floor, Los Angeles, California 90071-2300, which is located in the county where any non-personal service described below took place.

On May 27, 2008, a copy of the following document(s):

**DEFENDANT 4ACCESS COMMUNICATIONS COMPANY'S REPLY IN
SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE**

was served on:

Gregory P. Goonan, Esq.
 The Affinity Law Group APC
 600 West Broadway, Suite 400
 San Diego, California 92101-3352
 Telephone: (619) 446-5661
 Facsimile: (619) 515-1197
ggoonan@affinity-law.com

Service was accomplished as follows.

By U.S. Mail. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice the mail would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

By Electronic Means. On the above date, I filed the above-mentioned document(s) by electronic means with the Court. As such, the Court electronically mailed such document(s) to the parties noted above, whose electronic mail address is set forth above.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on May 27, 2008, at Los Angeles, California.

s/Jeffrey S. Renzi

Jeffrey S. Renzi